

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs August 20, 2008

TIMMY REAGAN v. STATE OF TENNESSEE

Appeal from the Criminal Court for Overton County
No. 4594 David Patterson, Judge

No. M2007-01396-CCA-R3-PC - Filed February 2, 2009

The petitioner, Timmy Reagan, appeals the denial of his petition for post-conviction relief, alleging that he was deprived of the effective assistance of counsel. Because of concerns regarding the timeliness of the petition for post-conviction relief, the case must be remanded to the post-conviction court for a determination of whether the petition was filed within one year of this court's opinion affirming the petitioner's conviction or whether due process requires the tolling of the one-year statute of limitations in this case.

Tenn. R. App. P. 3; Judgment of the Criminal Court Reversed and Remanded

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and CAMILLE R. McMULLEN, J., joined.

John Milton Meadows, III, Cookeville, Tennessee, for the appellant, Timmy Reagan.

Robert E. Cooper, Jr., Attorney General and Reporter; J. Ross Dyer, Assistant Attorney General; William E. Gibson, District Attorney General; and Owen Burnett and Ben Fann, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Procedural Background

An Overton County Criminal Court jury convicted the petitioner of the first degree murder of his wife, Christy Reagan, by means of premeditation and by placing or discharging a destructive device or bomb, *see* T.C.A. § 39-13-202(a)(1), (3) (1997), and the trial court merged the offenses into a single conviction and imposed a life sentence, *see id.* § 39-13-204(a), (f). Following an unsuccessful appeal to this court, *see State v. Timmy Reagan*, No. M2002-01472-CCA-R3-CD (Tenn. Crim. App., Nashville, May 19, 2004), the petitioner filed a petition for post-conviction relief in July 2005. Then, on August 30, 2005, the petitioner filed a petition for writ of error coram nobis based upon his discovery that Overton County Medical Examiner Charles Harlan had been indicted

for perjury, falsifying evidence, and unprofessional conduct and had, in fact, lost his medical license as a result of certain questionable behavior.¹

After the appointment of counsel, the petitioner filed an amended petition for post-conviction relief and an amended petition for writ of error coram nobis on April 2, 2007. The post-conviction petition alleged that the petitioner was denied the effective assistance of counsel at trial and on appeal, that the State engaged in prosecutorial misconduct, and that the cumulative effect of the errors of counsel and the prosecutor entitled him to post-conviction relief. In his bid for coram nobis relief, the petitioner alleged that the developments regarding Doctor Harlan called into question the doctor's testimony with regard to the physical evidence in the petitioner's trial. An evidentiary hearing on the petitions was held on May 16, 2007.

II. Timing of Petition for Post-Conviction Relief

Although the original petition for post-conviction relief is not a part of the appellate record, the amended petition indicates an original file date of July 21, 2005, and the order denying post-conviction relief indicates an original file date of July 18, 2005. In his amended petition, the petitioner alleges that his application for permission to appeal to our supreme court was "denied sometime in the month of August 2004" and the State did not challenge this assertion. However, the August 30, 2004 order of the supreme court establishes that the petitioner's application for permission to appeal was not denied, as the petitioner asserts, but was dismissed as untimely. *See State v. Timmy Reagan*, No. M2002-01472-SC-R11-CD (Tenn. Aug. 30, 2004).

Although neither the parties nor the post-conviction court has questioned the timeliness of the post-conviction petition, we are mindful that the statute of limitations for filing a post-conviction petition is jurisdictional. *See* T.C.A. § 40-30-102(b) (2003) ("No court shall have jurisdiction to consider a petition filed after the expiration of the limitations period unless [certain statutory prerequisites are met]."). Our supreme court has held that "the one-year statutory period is an element of the right to file a post-conviction petition and that it is not an affirmative defense that must be asserted by the State." *State v. Nix*, 40 S.W.3d 459, 464 (Tenn. 2001). Thus, "it is incumbent upon a petitioner to include allegations of fact in the petition establishing either timely filing or tolling of the statutory period," and the "[f]ailure to include sufficient factual allegations of either compliance with the statute or [circumstances] requiring tolling will result in dismissal." *Id.*

In this case, the petitioner included in his amended petition allegations of fact that ostensibly established the timeliness of the petition. Namely, he stated that his application for

¹The timeliness of this petition is also questionable given that in criminal cases, the statute of limitations for a petition seeking a writ of error coram nobis is one year. *See* T.C.A. §§ 40-26-105(a); 27-7-103 (2000); *see also State v. Mixon*, 983 S.W.2d 661, 670 (Tenn. 1999). In coram nobis cases, however, the statute of limitations is an affirmative defense that must be raised by the State in the trial court. *See Harris v. State*, 102 S.W.3d 587, 593 (Tenn. 2003) (citing *Sands v. State*, 903 S.W.2d 297, 299 (Tenn. 1995)). In any event, because the petitioner does not challenge the denial of the petition for writ of error coram nobis, the timeliness of the petition is not an issue in this appeal.

permission to appeal to our supreme court was “denied sometime in the month of August 2004.” As we have already indicated, however, this is an incorrect statement of fact upon which the State and the post-conviction court apparently relied. The post-conviction statute of limitations did not begin to run from the August 30, 2004 dismissal of the petitioner’s untimely application for permission to appeal because “‘filing an untimely application for permission to appeal to [the supreme court] does not constitute ‘an appeal’ as that term is used in Tennessee Code Annotated § 40-30-[1]02(a) and therefore does not delay commencement of the one-year post-conviction statute of limitations.’” *Williams v. State*, 44 S.W.3d 464, 471 (Tenn. 2001) (quoting *id.*, Holder, J., dissenting). Instead, the time for filing a post-conviction petition in this case began on May 19, 2004, when this court affirmed the petitioner’s conviction. *See id.* Thus, the petition for post-conviction relief filed in this case on either July 18 or July 21, 2005, was time-barred.

That being said, however, “strict application of the statute of limitations may not deny a petitioner ‘a reasonable opportunity to assert a claim in a meaningful time and manner.’” *Id.* at 468 (quoting *Seals v. State*, 23 S.W.3d 272, 279 (Tenn. 2000)). When “the record indicates that the [petitioner] might have been denied the opportunity to challenge his conviction in a timely manner through no fault of his own but because of the possible misrepresentation of his counsel,” due process concerns are implicated. *Id.*

In *Williams*, appointed counsel failed to file either a timely application for permission to appeal to the supreme court or a motion to withdraw pursuant to Rule 14 of the Rules of the Supreme Court following this court’s January 9, 1995 opinion affirming his convictions. On October 18, 1995, appointed counsel filed a motion to withdraw and, in his motion, asked this court to enlarge the time for filing an application for permission to appeal. *Id.* at 465-66. Despite this court’s dismissal of his motion as untimely, appointed counsel nevertheless filed an application for permission to appeal to the supreme court on November 8, 1995. *Id.* The supreme court dismissed the application for permission to appeal as untimely. On October 24, 1996, Williams, now acting pro se, filed a petition for post-conviction relief alleging, among other things, that appointed counsel was ineffective for failing to file a timely application for permission to appeal to our supreme court. *Id.* at 466. The post-conviction court dismissed the post-conviction petition after Williams appeared at his evidentiary hearing unprepared to present evidence, and this court disapproved of the dismissal on those grounds but for the first time observed that the petition was likely time-barred and remanded the case to the post-conviction court for a determination of the timeliness of the petition. *Id.* at 467. Recognizing that “[t]o summarily terminate [Williams’] claim without further inquiry would be an ‘abridgement of both direct and post-conviction avenues of appeal--without ever reaching the merits of the [Williams’] case--[and] would be patently unfair,’” our supreme court remanded Williams’ case for a determination of whether counsel’s misrepresentation regarding the filing of an application for permission to appeal had denied Williams an opportunity to seek timely post-conviction relief. *Id.* at 471 (quoting *Crittenden v. State*, 978 S.W.2d 929 (Tenn. 1998) (fourth alteration in original)).

The facts of this case are strikingly similar to those in *Williams*. The petitioner, like Williams, apparently timed the filing of his post-conviction petition to our supreme court’s dismissal

of his untimely application for permission to appeal. In addition, the record establishes that the petitioner's appointed counsel did not file a Rule 14 motion to withdraw following this court's opinion affirming the petitioner's conviction. Despite counsel's failure to withdraw, the petitioner filed his application for permission to appeal pro se on July 28, 2004, ten days too late.

Given these unique circumstances, a remand to the post-conviction court is in order. Upon remand, the post-conviction court shall determine whether the petition for post-conviction relief was filed within one year of this court's May 19, 2004 opinion affirming his conviction. If the petition was not timely filed, then the post-conviction court shall determine whether counsel misrepresented to the petitioner his intention to pursue an application for permission to appeal to our supreme court and, if so, whether counsel's misrepresentation denied the petitioner the opportunity to timely seek post-conviction relief.

III. Conclusion

The original petition for post-conviction relief appears to have been filed outside the one-year statute of limitations applicable to post-conviction claims. Due process concerns are implicated, however, because the petitioner's appointed counsel failed to file either a timely application for permission to appeal or a motion to withdraw pursuant to Rule 14 of the Rules of the Supreme Court. In consequence, the case must be remanded for a determination of whether the petition was timely filed or whether due process requires the tolling of the statute of limitations in this case.

Accordingly, the judgment of the post-conviction court is reversed and the cause is remanded to that court.

JAMES CURWOOD WITT, JR., JUDGE